STATE OF MICHIGAN

COURT OF APPEALS

ROYAL MCQUIRE, Personal Representative of the Estate of MINNIE MCGUIRE,

Plaintiff-Appellant,

v

HARRY J. WASVARY, M.D.,

Defendant-Appellee,

and

WILLIAM BEAUMONT HOSPITAL,

Defendant.

UNPUBLISHED
January 25, 2005

No. 248309
Oakland Circuit Court
LC No. 2002-043598-NH

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

In this medical malpractice action, the defense challenged the qualifications of plaintiff's expert who, in an affidavit filed with the litigation, rendered an opinion regarding the standard of care and any breach. Specifically, defendant Dr. Wasvary asserted that he specialized in colon and rectal surgery at the time of the alleged malpractice. On the contrary, the expert provided by plaintiff was a general surgeon who did not practice in the same specialized area as defendant. Therefore, the defense moved for summary disposition of the complaint. The trial court concluded that the affidavit of merit did not comply with the statutory requirements, and there was no reasonable belief that plaintiff's expert was qualified to render an opinion. We affirm.

On September 6, 2002, plaintiff, the personal representative of the estate of decedent, filed a medical malpractice action, alleging that the decedent suffered from a bowel obstruction following a colonoscopy in December 1999. Despite the obstruction, plaintiff's decedent was released from the hospital, but was readmitted to the hospital after complaining of abdominal pain. Seven days later, the decedent died. In the complaint, it was alleged that defendant Dr. Wasvary and the general surgery residents of defendant hospital breached the standard of care by discharging her with the presence of the obstruction and failing to properly treat the obstruction, including but not limited to, prescribing the appropriate antibiotics, and failing to diagnose the obstruction. With the complaint, an affidavit of merit was filed by Chester Semel, M.D., indicating that he was a board certified general surgeon at the time of the alleged malpractice and

was familiar with the standard of practice of a general surgeon and general surgery resident. The affidavit of merit contained the same alleged breaches of the standard of care delineated in the complaint.

On October 30, 2002, defendant moved for summary disposition. It was alleged that the affidavit filed by plaintiff was defective because Dr. Semel did not practice in the same specialty as defendant Dr. Wasvary. Furthermore, defendant asserted that he was a fellowship-trained colon and rectal surgeon. However, Dr. Semel was not a specialist in colon and rectal surgery and could only attest to the standard of care for general surgery. Therefore, defendant concluded that plaintiff had failed to comply with the statutory affidavit of merit requirement found in MCL 600.2912d, and dismissal was the appropriate remedy for the filing of a defective affidavit of merit.

Plaintiff opposed the motion for summary disposition, asserting that general surgery was a recognized specialty within the field of medicine, and defendant was a board certified general surgeon.[1] Therefore, plaintiff alleged that Dr. Semel, as a board certified general surgeon, was qualified to render an opinion regarding defendant's breach of the standard of care. Additionally, plaintiff alleged that defendant was not board certified in anything other than general surgery at the time of treatment. The trial court concluded that the statutory requirements were not satisfied when plaintiff's expert was a general surgeon whereas defendant was a colorectal surgeon. Additionally, the trial court concluded that plaintiff could not have a reasonable belief that Dr. Semel was qualified to render an opinion when plaintiff's counsel had utilized Dr. Semel repeatedly in the past, and therefore, was aware of his qualifications and his expertise.

Plaintiff asserts that the trial court erred in granting defendant's motion for summary disposition. We disagree. Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent, the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Additionally, the rules addressing the propriety of summary disposition are also at issue in this appeal. We review summary disposition decisions de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial.

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[1] Although plaintiff's brief in opposition to the motion for summary disposition is not contained within the lower court file, plaintiff's position can be determined from the surreply brief and the brief on appeal.

Id. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

MCL 600.2912d(1) provides, in pertinent part:

> Subject to subsection (2),[2] the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169].

MCL 600.2169 addresses the qualifications of an expert witness in a medical malpractice action and provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
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> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

In *Halloran v Bhan*, 470 Mich 572, 575; 683 NW2d 129 (2004), the defendant physician treated the plaintiff's decedent. The defendant was board-certified in internal medicine, but also held a certificate of added qualification in critical care medicine. Both certifications were obtained from the American Board of Internal Medicine (ABIM). The parties did not dispute that the certificate of added qualification was not governed by the board certification requirements of the medical malpractice statute. *Id*.

The plaintiff presented an expert who was not board-certified in internal medicine. Rather, the plaintiff presented an expert who was board certified in anesthesiology by the American Board of Anesthesiology (ABA). However, the plaintiff's expert also received a certificate of added qualification in critical care medicine from the ABA. The plaintiff's expert was not board certified in internal medicine nor did he have the applicable training that would make him eligible for internal medicine certification. Because the board certifications did not

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[2] Subsection (2) of the statute addresses a motion for an extension of time to file the affidavit of merit where good cause is shown and is not at issue on appeal.

match, the defendant physician moved to strike the plaintiff's expert, and the circuit court agreed. The Court of Appeals reversed, concluding that the expert fell within the statutory requirements where the subspecialty of critical care was shared by both physicians. *Id*. at 575-576.

The Supreme Court reversed the holding of the Court of Appeals, stating:

> We must now determine whether MCL 600.2169(1)(a) requires that an expert witness share the same board certification as the party against whom or on whose behalf the testimony is offered. We hold that it does.
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> The Court of Appeals majority held that it is sufficient under the statute if the expert witness and the defendant doctor share only the same subspecialty, but not the same board certification. We disagree because this argument runs contrary to the plain language of the statute.
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> This interpretation is supported by the use of the word "however" to begin the second sentence. Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-249; 596 NW2d 574 (1999); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). *Random House Webster's College Dictionary* (2d ed) defines "however" as "in spite of that" and "on the other hand." Applying this definition to the statutory language compels the conclusion that the second sentence imposes an *additional* requirement for expert witness testimony, not an optional one. In other words, "in spite of" the specialty requirement in the first sentence, the witness must also share the same board certification as the party against whom or on whose behalf the testimony is offered.
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> There is no exception to the requirements of the statute and neither the Court of Appeals nor this Court has any authority to impose one. As we have invariably stated, the argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court. See *Jones v Dep't of Corrections*, 468 Mich 646, 655; 664 NW2d 717 (2003).
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> It is not disputed that defendant Bhan is board certified in internal medicine, but proposed expert witness Gallagher is not. MCL 600.2169(1)(a) requires that the expert witness "must be" a specialist who is board certified in the specialty in which the defendant physician is also board certified. Because the proposed witness in this case is not board certified in the same specialty as Bhan, MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care. [*Id*. at 577-579 (footnotes omitted).]

In the present case, defendant filed an affidavit delineating his education and experience. Defendant graduated from Wayne State University School of Medicine in 1992, and followed his graduation with a residency in general surgery in 1998, and a fellowship in colon and rectal surgery in 1998-1999. In December 1999, defendant exclusively practiced in the area of colon

and rectal surgery, an area he categorized as a distinct sub-specialty of general surgery. At the time of the alleged malpractice, defendant was board *eligible* for certification by the American Board of Colon and Rectal Surgeons and had since obtained his board certification in this specialty. Defendant opined that surgeons who wished to practice in the area of colon and rectal surgery were "typically" required to be specialists trained in the area of colon and rectal surgery. Defendant reviewed the affidavit and qualifications presented by plaintiff's expert. Based on this evaluation, Dr. Semel was not trained in the area of colon or rectal surgery and was not a member of the American Board of Colon and Rectal Surgeons.

Plaintiff did not file an affidavit from Dr. Semel to counter the attestations by defendant in his affidavit. Rather, the only affidavit filed by Dr. Semel was the affidavit of merit filed with the complaint. This affidavit merely concluded that Dr. Semel was a board certified general surgeon in 1999, and was familiar with the standard of practice for a general surgeon. The affidavit did not delineate whether Dr. Semel had any experience in the area of colon and rectal surgery.

Plaintiff alleges that because both surgeons were board certified in general surgery at the time of the alleged malpractice, the requirements of MCL 600.2169 are satisfied. We disagree. Again, the key portion of the statute at issue provides:

> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

As stated by the *Halloran* Court, MCL 600.2169(1)(a) delineates *two* requirements for qualification of an expert witness in a medical malpractice case. With regard to the first requirement, the physicians are compared to determine if the physician is a specialist in a particular area. Where the subject of the litigation surrounds the actions of a specialist, that testimony must be countered with the testimony of an individual in the same specialty. MCL 600.2169(1)(a); *Halloran supra* at 578-579. Then, if it is determined that the testimony is offered against a board certified specialist,[3] the testimony offered by a witness must share the same board certification. *Id.*

Here, plaintiff's expert Dr. Semel has merely addressed the fact that both surgeons were board certified general surgeons at the time of the alleged malpractice. Plaintiff has failed to acknowledge the first requirement of the statute wherein it addresses whether testimony is offered against a specialist. Here, defendant has attested that he was a specialist in the area of colon and rectal surgery, regardless of the status of his board certification at the time of the

[3] We note that this additional requirement is premised upon a contingency. It is invoked *if* a board certified specialist is involved. See e.g., *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 529; 672 NW2d 181 (2003).

alleged malpractice. Plaintiff failed to counter this documentary evidence with an affidavit from a specialist in colon and rectal surgery. *Halloran, supra*; *Maiden, supra*. Plaintiff failed to present any documentation to counter the contention that colon and rectal surgery was a specialty area of general surgery and failed to delineate the qualifications and experience of Dr. Semel in this area.[4] Accordingly, the trial court properly concluded that plaintiff failed to satisfy the requirements of MCL 600.2169(1)(a). *Halloran, supra*.

Plaintiff nonetheless contends that there was a reasonable belief that Dr. Semel satisfied the requirements of MCL 600.2912d. We disagree. In *Grossman v Brown*, 470 Mich 593, 595-596; 685 NW2d 198 (2004), the defendant performed surgery on plaintiff's decedent. The defendant was board certified in the area of general surgery and also held a "certificate of special qualifications in vascular surgery." In preparation for litigation, the plaintiff's counsel researched the qualifications of defendant to obtain a qualified expert witness to satisfy the affidavit of merit requirement, MCL 600.2912d. The American Medical Association (AMA) website was searched where the defendant's qualifications indicated that he was board certified only in general surgery. There was no indication that the defendant held any board certification in vascular surgery. Based on this research, the plaintiff's counsel obtained an affidavit of merit from a physician board certified in general surgery, but who also specialized in vascular surgery. The defendant filed a motion for summary disposition, and the trial court denied the motion, concluding that the plaintiff's attorney had a reasonable belief that his expert satisfied the statutory prerequisites for an expert witness. *Id*. at 596-597.

The Supreme Court affirmed the trial court's denial of the dispositive motion, holding:

> Because this case presents a dispute involving the affidavit-of-merit stage, the issue before us is whether, according to MCL 600.2912d(1), plaintiff's attorney had a "reasonable belief" that his expert satisfied the requirements of MCL 600.2169. We hold that given the information available to plaintiff's attorney when he was preparing the affidavit of merit, he had a reasonable belief that Drs. Brown and Zakharia were both board-certified in their specialty of general surgery and that there was no board certification in vascular surgery.

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[4] We note that plaintiff cites *Watts v Canady*, 253 Mich App 468; 655 NW2d 784 (2002), for the proposition that there are distinctions between specialist and subspecialists, and that defendant's colon and rectal surgery constitutes a subspecialty of general surgery. However, the *Watts* Court did not reach the issue of whether a subspecialty was encompassed within a specialty for purposes of MCL 600.2169. Rather, the *Watts* Court merely held that the plaintiff's attorney had a reasonable belief that the expert was qualified. *Id*. at 471-472. Moreover, we note that MCL 600.2169 does not define or distinguish between specialist and subspecialists. However, the dictionary defines "specialist" as "a person devoted to one subject or to one particular branch of a subject or pursuit." *Random House Webster's College Dictionary* (2d ed), p 1260. Applying this definition to the statutory language, *Halloran, supra*, reveals that there is no such distinction where a specialist is devoted to a subject or a particular branch within a subject. Accordingly, this attempted distinction is without merit.

> The salient and dispositive facts are that plaintiff's attorney consulted the AMA website, which supplied him with information that defendant Brown was only board-certified in general surgery and that there is no vascular surgery board certification. Further, counsel consulted Dr. Zakharia, his expert, who reiterated that there is no vascular surgery board certification.
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> Thus, at the moment the affidavit of merit was being prepared, plaintiff's attorney used the resources available to him and reasonably concluded that he had a match sufficient to meet the requirements for naming an expert. It may be that what satisfied the standard at this first stage will not satisfy the requirements of MCL 600.2169 for expert testimony at trial. This will be decided on remand. To address this matter now, especially because there has been no fact-finding on the disputed factual questions, would be premature. It will be for the trial court, in its role as initial interpreter of the statute and qualifier of experts, to decide this issues as they become timely. [*Id*. at 599-600 (footnotes omitted).]

In the present case, plaintiff asserts that the reasonable belief requirement of MCL 600.2912d is satisfied because defendant was a general surgeon at the time of the alleged malpractice and an affidavit was obtained from a general surgeon. In the narrative portion of the brief, plaintiff's counsel asserts that the qualifications of the two surgeons were matched prior to the filing of the litigation and only discovery would have revealed that defendant was practicing in a subspecialty at the time of the malpractice. This blanket assertion is insufficient to oppose the motion for summary disposition. *Maiden, supra*. Plaintiff's counsel fails to delineate whether there was ever any research into the qualifications of defendant Dr. Wasvary and whether there was any attempt to match those qualifications with an expert for the purposes of filing an affidavit of merit with the complaint.[5] Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[5] Defendant attached deposition testimony from plaintiff's expert filed in other litigation. There is no indication that plaintiff's expert had performed any surgery within the area of expertise held by defendant. Plaintiff fails to delineate whether the qualifications and any experience in colon and rectal surgery by Dr. Semel was questioned by counsel.